IN THE

Supreme Court of the United States

OCTOBER TERM—1976

No. 76-770

WILLIAM CAHN,

Petitioner,

against

THE UNITED STATES OF AMERICA,

Respondent.

PETITIONER'S REPLY BRIEF

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March 16, 1977

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Statement

This brief is submitted in reply to that of the United States in this matter.

POINT I

Because the Government has failed to justify adding the additional charges to the superseding indictment, certiorari should be granted and it should be dismissed in all respects.

The Government contends that the due process argument is not properly before the Court because it was not timely raised below. In defendant's memorandum in support of his pretrial application to dismiss the superseding indictment an entire point is based on the double jeopardy and due process aspects of the case. Specifically, the point heading utilized in that memorandum states:

> "THE SUPERSEDING INDICTMENT IS BARRED BY THE DOUBLE JEOPARDY AND DUE PROCESS PROVISIONS OF THE FIFTH AMENDMENT." (65).

Particular attention is directed to pages 74a-75a in which a due process argument is specifically raised. Further, believing that the superseding indictment was a nullity, at the arraignment thereon, defendant stood mute, and the Court entered the not guilty plea on his behalf. Also, the due process aspect of the case as developed from *Blackledge* v. *Perry,* 417 U.S. 22, was appropriately raised by a post-trial motion which Judge Judd himself categorized:

> "Well, the motion is primarily a repetition and I thought for the record that I passed on that during the trial." (1959)

Accordingly, it is submitted that the issue has been properly and timely raised.

The prejudice which Mr. Cahn claims accrued because the government "upped the ante" in the superseding indictment is clear, particularly in the light of the additional punishment of unsupervised probation which was meted out in connection with Count No. 46. In addition the inclusion of Count No. 46 in the superseding indictment formed the predicate for the inclusion of the so-called "similar acts", all of which permeated the trial to such a degree, which, it is submitted, deprived the defendant of a fair trial on the charges in the superseding indictment. In essence, then, the prejudice is clear and, for the reasons set forth in the Petition, to try him on the superseding indictment was to deny him due process of law, and to twice place him in jeopardy with the result that the conviction may not stand.

The attempt of the Government to justify the superseding indictment as set forth on pages 5 and 6 of its Brief in Opposition should be unavailing. The Government admits that the superseding indictment was requested from the grand jury only because Petitioner, in the first trial, raised a particular defense: Sam Houston. In fact, such "jurisdiction" on its face spells out retaliation in that the claim is made that because of what transpired at the first trial, the additional counts were added. It is submitted that this conduct is precisely what the Courts in *U.S.* v. *Ruesga Martinez,* 534 F2d 1367, *U.S.* v. *Jamison,* 505 F2d 407 and *U.S.* v. *Johnson,* 537 F2d 1170, were condemning.

If it becomes critical to this application at this stage to determine the manner in which the Sam Houston defense was introduced into the first trial, then it is submitted that a hearing be held on the subject. In this regard, the Government should concede that it brought "Sam Houston" into the first trial itself by the introduction of Petitioner's grand jury testimony into evidence. Thereafter, Petitioner took the stand and had to get into the details.

Further, *U.S.* v. *DiMarco,* 401 F. Supp. 505, speaks at length about the role and function of the grand jury in our criminal justice system. In particular *DiMarco* was concerned with the necessity in our society for an independent and informed grand jury as described in *Wood* v *Georgia,* 370 US 375, and in *U.S.* v. *Calandra,* 414 US 338. It seems that the government, in the case at bar, was able to control the grand jury to such an extent in the first instance that it did not bring an indictment in connection with all the matters that were then before it. After the trial of the original indictment resulted in a hung jury, the government exercised even further control over the same grand jury that it then brought 35 additional charges without hearing any further evidence. The government's control over this grand jury is highlighted by bringing it into the courtroom right in the middle of the second trial in order to hand up to Judge Judd an amendment to the indictment. (870 et seq.).

Based upon all of the above, it is submitted that it is clear that the defendant's rights to due process and to be free of double jeopardy have been violated.

Accordingly, the Petition should be granted.

POINT II

The false statement counts are not governed by *U.S.* v. *Candella,* 487 F2d 1226.

The government takes the position that *U.S.* v. *Candella,* 487 F2d 1226, a 1973 decision of this Court, governs the false statement counts in this indictment. In *Candella* the statements involved were included in affidavits which were submitted on forms prepared by the City of New York and not by HUD. However, the affidavits involved specifically contained advice to the signers which pointedly

made them aware of the nature and purpose of the affidavit and also advised them that false statement in the affidavit would be violative of the U.S. Code (487 F2d 1226). The case at bar is distinguishable on this point because, as set forth in defendant's main brief, it was established at the trial that none of the entities involved were, in fact, agencies or departments of the United States even though they did receive Federal funding and, indeed, it is uncontradicted in the record that there was no policy of the LEAA regarding reimbursement for travel expenses actually communicated to Mr. Cahn, nor was he ever directly involved with any aspect of LEAA, nor did he ever claim directly to LEAA.

Accordingly, *Candella* does not control and, for the reasons set forth in Point II of petitioner's main brief, the false statement counts should be dismissed. Therefore, certiorari should be granted.

CONCLUSION

For the reasons set forth herein and in the petitioner's main brief, certiorari should be granted.

Respectfully submitted,

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